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Governmental Tort Liability—An Interim Solution for Nebraska—*Stadler v. Curtis Gas, Inc.*, 182 Neb. 6, 151 N.W.2d 915 (1967) (rehearing denied Sept. 22, 1967)

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GOVERNMENTAL TORT LIABILITY—AN INTERIM SOLUTION FOR NEBRASKA—*Stadler v. Curtis Gas, Inc.*, 182 Neb. 6, 151 N.W.2d 915 (1967) (rehearing denied Sept. 22, 1967).

Roy Stadler was injured on May 20, 1965, in a gas explosion caused by a defective valve on a water heater in the residence he was leasing from the defendant, the Board of Regents of the University of Nebraska. Mr. Stadler died on June 7, 1965, as a result of these injuries. He had been leasing the property as tenant since February 27, 1965, and this was his only relationship with the Board of Regents.

This action was brought by Mrs. Stadler, as administratrix of the deceased's estate, against the Board of Regents and Curtis Gas, Inc., to recover damages for the injury and death. The basis of the action was that the defendant, Curtis Gas, Inc., had serviced the water heater in March at the request and authorization of the Board of Regents. The valve was found to be defective, and Curtis Gas, Inc., so notified the Board of Regents. Neither defendant, however, did anything to repair or replace the valve. Negligence was predicated on the failure to keep the premises in a safe condition and the failure to warn the deceased of the defective valve. A general demurrer, filed by the Board of Regents, was sustained by the district court, which dismissed the action as to that defendant. The plaintiff appealed to the Supreme Court of Nebraska where the case was reversed and remanded to determine if there was any basis for liability on the part of the Board of Regents.

The court, in a four-three decision, abolished the immunity from tort liability that the Board of Regents had previously enjoyed. The Board of Regents is one of the state agencies in Nebraska for which immunity from tort liability has not been specifically removed by legislative enactment. In the past, such agencies could successfully defend an action for tortious conduct by pleading sovereign immunity.[1] However, the *Stadler* decision eliminated this defense when these agencies are acting in certain capacities. Justice McCown, in the concurring opinion, concluded that "[w]hile the majority opinion here does not constitute an immediate and complete abrogation of the entire doctrine of governmental immunity

[1] The doctrine of sovereign immunity had been constantly reaffirmed in Nebraska. *See* Gentry v. State, 174 Neb. 515, 118 N.W.2d 643 (1962); Mutual Life Ins. Co. v. Nordues, 129 Neb. 379, 261 N.W. 687 (1935); Kent v. State, 118 Neb. 501, 225 N.W. 672 (1929); Shear v. State, 117 Neb. 865, 223 N.W. 130 (1929); McShane v. Murray, 106 Neb. 512, 184 N.W. 147 (1921); Bunting v. Oak Creek Drainage Dist., 99 Neb. 843, 157 N.W. 1028 (1916); State v. Mortensen, 69 Neb. 376, 95 N.W. 831 (1903).

in Nebraska, its implications suggest the desirability of legislative action."[2] Although the extent to which immunity is abolished is of extreme importance to the State of Nebraska, insurance companies, and the practicing attorney, the impact of this decision on the respective parties is left in doubt. This article will attempt to determine how *Stadler* changed the character of governmental immunity in Nebraska.

The Board of Regents of the University of Nebraska is a state agency created under the Constitution of the State of Nebraska.[3] It is "a body corporate, and as such may sue and be sued."[4] This clause is the state's statutory consent to suit against the Board of Regents. The court in *Stadler* held that "a consent to suit is a waiver of immunity from suit which permits the enforcement of a preexisting liability."[5] The preexisting liability is determined under ordinary tort doctrines by which a legally enforceable liability attaches to the Board of Regents only if there is no immunity for the function performed which occasioned the negligence. "This statute permits the maintenance of an action against the Board of Regents but it is not a waiver of any immunity from liability."[6]

The law of governmental tort liability in Nebraska, prior to *Stadler*, is found in a case cited in *Stadler* as supporting the statement that there still existed immunity from liability in a suit against the state.

> By consenting to be sued a state simply waives its immunity from suit. It does not thereby concede its liability to plaintiff, or create any cause of action in his favor, or extend its liability to any cause not *previously* recognized. It merely gives a remedy to enforce a preexisting liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense.[7]

This was the first time the precise issue had been decided where there was a statute allowing suit but no statute allowing liability. The outcome was decided as follows:

> There is no statute making the state liable for the negligence of its employees. The Senate resolution authorized the plaintiff to maintain the suit for the purpose of ascertaining, determining and obtaining an adjudication of his claim and the liability of the state for the payment thereof.... The resolution simply gave the right to bring the action, but did not create a cause of action. By virtue

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2 Stadler v. Curtis Gas Inc., 182 Neb. 6, 22, 151 N.W.2d 915, 924 (1967).
3 NEB. CONST. art. VII, § 10.
4 NEB. REV. STAT. § 85-105 (Reissue 1966).
5 182 Neb. at 8, 151 N.W.2d at 917.
6 182 Neb. at 8, 151 N.W.2d at 917.
7 Shear v. State, 117 Neb. 865, 868, 223 N.W. 130, 131 (1929) (emphasis added).

> of its sovereignty, there was no obligation or duty on the state to respond in damages for the negligence of its agents.[8]

There is no statute in Nebraska specifically allowing liability for tortious conduct of the Board of Regents. Nor had the Board of Regents ever been held liable for its tortious conduct prior to *Stadler*. If the court in *Stadler* had strictly adhered to the pre-existing law, it would have had to find that the act of the Board of Regents gave rise to a "*previously* recognized" cause of action. This the court seemed to attempt to do by claiming that the determinative test of liability for a specific function is found in the governmental-proprietary dichotomy.[9] This dual-capacity test was applied to the tort issue involved.

State agencies and subdivisions, prior to *Stadler*, were generally held liable when they breached a contract. Entering into a contract is a function so nearly akin to that of private business that it would be unjust to permit immunity. "The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract."[10] However, tort liability for negligence while acting in a proprietary capacity was limited to municipal corporations, and there still existed an "immunity from liability" for the state.[11] What the court in *Stadler* did was to apply

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[8] *Id.* at 868, 223 N.W. at 131.

[9] 182 Neb. at 8, 151 N.W.2d at 917.

[10] Stoller v. State, 171 Neb. 93, 102, 105 N.W.2d 852, 857 (1960). "[W]hen a state, by itself or through its corporate creations, embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling." Sorensen v. Chimney Rock Public Power Dist., 138 Neb. 350, 354, 293 N.W. 121, 123 (1940). *See also* Platte Valley Public Power & Irrigation Dist. v. County of Lincoln, 144 Neb. 584, 14 N.W.2d 202 (1944); and State v. Merritt Brothers Sand & Gravel Co., 180 Neb. 660, 144 N.W.2d 180 (1966), where the state had brought suit to enforce its rights of ownership.

[11] The court had been unwilling to expand municipal government's liability for tortious conduct to other state subdivisions. *See* Bunting v. Oak Creek Drainage Dist., 99 Neb. 843, 157 N.W. 1028 (1916); and Woods v. Colfax County, 10 Neb. 552, 7 N.W. 269 (1880), which points out the distinction between municipal corporations that may be liable for the performance of proprietary functions and counties which are "not so liable." This is because the municipal corporation voluntarily assumes many activities and acts for the benefit of only a segment of the state's population. *See also* Greenwood v. City of Lincoln, 156 Neb. 142, 55 N.W..2d 343 (1952), where it is explained that a municipal corporation has a dual capacity: that of representative of the state, and that of carrying out its corporate duties. However, there is also a third relation where it carries out voluntary activities subject to the same laws governing private corporations.

the governmental-proprietary test to a state level agency in an activity involving tortious conduct. And since it was alleged "that there was no relationship between the Board of Regents and the deceased other than that of landlord and tenant, and that the leasing of the property by the Board of Regents was in the same nature and capacity as that of private parties leasing dwelling houses for rent,"[12] the court held that this is a proprietary function and the Board of Regents must be liable for its negligence. Since such a cause of action was not previously recognized, the court must have removed the immunity from liability that had been a bar to such application of the governmental-proprietary test.

The governmental-proprietary distinction is the traditional test for determining the liability of the state or its subdivisions.[13] The three commonly applied criteria for proprietary activity are: (1) whether the governmental body seeks a profit; (2) whether the activity is for the benefit of all the public or for a smaller group; or (3) whether the activity has been traditionally and historically performed by government or by private persons and organizations.[14] The court in *Stadler* impliedly points to the third criterion. However, with nothing more its application may be highly unpredictable. One would not have to go far to find instances of private individuals or corporations carrying on the same activities in which the state is engaged, such as a professional football stadium or a boarding house. These activities could easily be analogized to the football stadium or a dormitory at the University of Nebraska. Of course, one may argue that these activities are clearly distinguishable since the University is an education institution in which any proceeds are used in its principal operations. But a literal reading of the test could very well lead to liability for negligence within such functions. Almost every activity carried on by the state has a relatively similar counterpart in private business. Justice McCown, concurring, stated: "The governmental-proprietary distinction is unsatisfactory.... The [distinction], however, does provide a case-by-case[15] modification of the doctrine of governmental immunity in the traditional pattern of solution."[16]

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12 182 Neb. at 8-9, 151 N.W.2d at 917.

13 *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125 (3d ed. 1964), for a full discussion of governmental immunity.

14 Baum, *Governmental Immunity in Michigan—Some Recent Developments,* 44 MICH. S.B.J. No. 5, 37 (1965).

15 In dealing with governmental immunity "[t]he location of the precise line here seems to call for the method of case-to-case adjudication." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.13, at 491 (1958).

16 182 Neb. at 21, 151 N.W.2d at 924.

Under the case-by-case method of adjudication, each case must be decided on its own particular facts. But since the governmental-proprietary test, as expressed by the court in *Stadler*, may be open to diverse interpretations, one must also consider the scope of the decision and the future of the doctrine of governmental immunity in Nebraska.

Nebraska has joined a group of states which have judicially abrogated sovereign immunity, at least to some extent. The law of each state is unique, but the abrogating decisions are helpful in showing what effect *Stadler* may have on the Nebraska legislature. Each decision has acted as a catalyst in moving the respective state legislature to enact statutes providing for governmental liability or immunity.[17]

After *Molitor v. Kaneland Community Unit Dist. No. 302*,[18] the Illinois legislature set limits on liability[19] and restored immunity to counties.[20] In Minnesota the legislature reacted to *Spanel v. Mounds View School Dist. No. 621*[21] by enacting the 1963 Governmental Tort Liability Act.[22] California's response to *Muskopf v.*

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17 For discussions on sovereign immunity in the United States and the various states in which it has been judicially abrogated, and the reaction of the respective legislatures *see:* Casenote, *Municipal Corporations—Tort Liability for Governmental Functions—Holytz* v. *City of Milwaukee (Wisconsin 1962)*, 42 NEB. L. REV. 710 (1963); Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888; Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963); Hamill, *The Changing Concept of Sovereign Immunity*, 13 DEFENSE L.J. 653 (1964); Baum, *Governmental Immunity in Michigan—Some Recent Developments*, 44 MICH. S.B.J. No. 5, 37 (1965); Comment, *Governmental Liability for Torts of Employees—The End of Sovereign Immunity in California*, 5 SANTA CLARA LAW. 81 (1964); Recent Cases 46 MINN. L. REV. 1143 (1962); Hink & Schutter, *Some Thoughts on the American Law of Governmental Tort Liability*, 20 RUTGERS L. REV. 710 (1966); Van Alstyne, *Governmental Tort Liability; Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963); Comment, *Torts—Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability*, 41 N.C.L. REV. 290 (1963); Recent Cases, *Torts—The Disappearing Doctrine of Governmental Immunity from Tort Liability*, 26 GA. B.J. 435 (1964).

18 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

19 ILL. REV. STAT. ch. 122, § § 821-831 (1961).

20 ILL. REV. STAT. ch. 34, § 301.1 (1959).

21 264 Minn. 279, 118 N.W.2d 795 (1962).

22 Ch. 798, Minn. Sess. Laws of 1963.

Corning Hosp. Dist.[23] was to declare a two-year moratorium[24] on the decision until ninety-one days after the adjournment of the 1963 California Legislature. During this time the California Law Revision Commission made a detailed study resulting in a recommendation[25] upon which the 1963 session virtually rewrote the California law.[26] If these examples serve as an indication of the legislative response to judicial abolishment of sovereign immunity, then the probability of a forthcoming enactment in this area by the Nebraska legislature is almost certain.

Since no moratorium has been declared on *Stadler*, the decision has been effective since July, 1967, and since the Nebraska State Legislature does not convene for a regular session until 1969, *Stadler* will be the "law" for at least somewhat less than two years. The problem is whether *Stadler* will serve as an effective interim solution.

> The court can best fulfill its role by enunciating a decision which will serve as a catalyst to legislative action and as an interim solution to the many problems which will undoubtedly arise due to a change in a long established policy of governmental immunity. Therefore, in formulating an abrogating opinion, the court should be aware of the pitfalls and uncertainty in most of the jurisdictions which have already judicially abolished governmental immunity. Furthermore, the court should include in the abrogating opinion an indication as to how far it intends to extend governmental liability. Thus the bench must determine where the limits of governmental responsibility should be drawn.[27]

Although the court in *Stadler* used the governmental-propritary test as the means for determining whether immunity exists or not, the case-by-case method for its implementation will have to

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23 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

24 Ch. 1404, Cal. Sess. Laws of 1961. This was construed in Corning Hosp. Dist. v. Superior Court of Tehama County, 57 Cal. 2d 488, 370 P.2d 325, 20 Cal. Rptr. 621 (1962), as merely a suspension of the right to bring or maintain a tort action.

25 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 807 (1963). However, law revision in this area is by no means an easy task. "Any legislation as long and complex as the 1963 governmental liability measures is bound to show defects as its provisions are used. The 1963 legislation is a major improvement in the law of California, but work still remains to be done before the interests of injured persons and the interests of the public at large are completely and properly resolved." Cobey, *The New California Governmental Tort Liability Statutes*, 1 HARV. J. LEGIS. 16, 27 (1964). (Mr. Cobey was a member of the Law Revision Commission and a California state senator.)

26 For the applicable statutes *see* Comment, *The Role of the Courts in Abolishing Governmental Immunity*, DUKE L.J. 1964:888, n. 15 at 892 (1964).

27 *Id.* at 892.

be applied in light of what will probably be the only solution—legislative action.[28] To what extent this will help resolve the ambit of the proprietary function is doubtful. It could very well mean that a rather conservative application of the test will be applied.

The state is sovereign, and it "may sue and be sued and the legislature shall provide by law in what manner and in what courts suits shall be brought."[29] This constitutional provision is not self-executing;[30] there must be legislative action to make it effective. If the legislature chooses not to provide the procedural machinery for suit, then there is nothing in the *Stadler* decision to indicate that the state, or the agency in question, may be sued. It is most helpful to realize this procedural distinction in terms of procedural immunity and substantive immunity;[31] that is, immunity from suit as opposed to immunity from a determination of a legally enforceable liability. When the court speaks of the "consent to suit"[32] it is apparent that it did not wish to disturb this procedural requirement. "Permission to sue simply constitutes a procedural remedy; it does not predetermine the substantive result."[33] Thus, consent to suit is a prerequisite to going forward with a successful action. The statutory consent to sue the Board of Regents[34] is the fulfillment of the procedural requirement. The court in *Stadler* went further and abolished the substantive immunity which had previously acted as a bar to tort actions against agencies on the state level, and substituted the governmental-proprietary test.

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28 Nebraska may be ready to meet the problem head-on in the 1969 session of the state legislature. On the same day the *Stadler* appeal was filed, the 77th Session of the Nebraska State Legislature passed a resolution ordering the Executive Board of the Legislative Council to appoint a committee to make a study of the problem of sovereign immunity in Nebraska and other states, and to investigate the feasibility of establishing a State Torts Claims Act. Res. 73, 77th Neb. Leg. Sess. (1967).

29 NEB. CONST. art. V, § 22.

30 "This provision is not self-executing and requires legislative action to make it effective, and no suit could be maintained against the state until the legislature, by law, made a provision therefor." Shear v. State, 117 Neb. 865, 866, 223 N.W. 130 (1929).

31 Professor Van Alstyne uses these terms in discussing Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). Van Alstynye, *Governmental Tort Liability; Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963). The court in Stadler uses terms connoting immunity from suit and immunity from liability.

32 182 Neb. at 8, 151 N.W.2d at 917.

33 Van Alstyne, *supra note* 31, at 170.

34 NEB. REV. STAT. § 85-105 (Reissue 1966).

The court in *Muskopf v. Corning Hosp. Dist.*,[35] a California case, dealt with problems similar to those which the court in *Stadler* faced. In overruling substantive immunity that had also previously existed, Justice Traynor made the following statement:

> None of the reasons for its continuance can withstand analysis. No one defends total government immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative, and judicial, and the exceptions operate so illogically as to cause serious inequality.[36]

The exceptions made by the California Legislature were the removal of substantive immunity in certain areas. This same process has been taking place in Nebraska.[37] Therefore, if one would attempt to look to the legislative intent involved in this removal of substantive immunity, one would be faced with the problem of whether the legislature intended to retain immunity in all other areas.[38] In assessing the situation in California, Justice Traynor came to the following conclusion:

> We are not here faced with a situation in which the Legislature has adopted an established judicial interpretation by repeated reenactment of a statute... Nor are we faced with a comprehensive legislative enactment designed to cover a field. What is before us is a series of sporadic statutes, each operating on a separate area of governmental immunity where its evil was felt most.[39]

This same reasoning could be implied to the *Stadler* decision. The Nebraska Legislature, in removing substantive immunity from certain areas,[40] arguably did not have the specific intent of retaining

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35 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

36 *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.

37 *E.g.*, NEB. REV. STAT. § 39-834 (Reissue 1960), waiving immunity for defects in county roads.

38 In Nebraska the Sundry Claims Board was created to receive claims, against the state, for which no money has been appropriated. Such claims must then be presented to the legislature; however, "any claim for negligence or other tort not in excess of two hundred fifty dollars for which the state would be liable *if its immunity was waived* may be paid without submitting such claims to the Legislature (emphasis added) . . . ." NEB. REV. STAT. § 81-861 (Reissue 1966). The use of *immunity* in this section may mean that, with the exception of this special provision, one may not recover damages for negligence unless substantive immunity has been specifically waived by the legislature for the particular function. But if the legislature had this specific intent, it should have so provided in a special section. Thus, it seems more reasonable that this clause was enacted merely to provide for expediency in handling monetarily small claims even where there has been no specific removal of substantive immunity.

39 Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 218, 359 P.2d 457, 461 11 Cal. Rptr. 89, 93 (1961).

40 *See* note 37 *supra.*

immunity in those areas not considered. Therefore, it is submitted that *Stadler*, in abolishing substantive immunity in those areas not acted upon by the legislature, is not in direct conflict with legislative intent.

Abolishment of sovereign immunity has traditionally begun with municipal corporations[41] in Nebraska as well as in other states. The structure of the state, its agencies and subdivisions, may be viewed as a series in the distribution of power beginning with the municipal corporation, the most independent subdivision of the entire network, and continuing to the Board of Regents, an agency representing the entire population of the state. Each division in the series is on a progressively higher level, incorporating more of the state's population and performing more functions of the state. These were reasons given in the past for not expanding municipal government's liability to higher state subdivisions.[42] But since the *Stadler* decision allowed a determination of liability against the Board of Regents, which is on one of the highest levels in the series, then it is not too great an inference to submit that all state agencies and subdivisions within the gap between municipal corporations and the state itself are likewise amenable to liability if there is no procedural immunity. Justice Newton, dissenting, realized this same impact of the majority opinion when he stated:

> Its effects will be widespread in that it subjects some state agencies, and all counties and municipalities, to suits of all types. A few state agencies which have not been authorized to "sue and be sued" will still be protected by the constitutional provision above mentioned; otherwise there are no restraints.[43] (referring to NEB. CONST. art. V, § 22)

Justice Newton also stated in his dissent that although counties in Nebraska may "sue and be sued,"[44] they have always been held to be immune. " 'Counties are not liable in damages resulting from the negligent or tortious acts of their officers in the discharge of their official duties, in the absence of a statute creating such liability.' "[45] If the majority opinion is to be given its apparent effect, it seems that this contention should be overruled. A further study of examples of state agencies or subdivisions would be no more

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41 For Nebraska, *see generally* Burke v. City of South Omaha, 79 Neb. 793, 113 N.W. 241 (1907); Henry v. City of Lincoln, 93 Neb. 331, 140 N.W. 664 (1913), involving the city's water works; and Cook v. City of Beatrice, 114 Neb. 305, 207 N.W. 518 (1926), involving the city's electric plant.

42 *See* note 11 *supra.*

43 182 Neb. at 14, 151 N.W.2d at 920.

44 NEB. REV. STAT. § 23-101 (Reissue 1962).

45 182 Neb. at 13, 151 N.W.2d at 920, cited from Dawson County Irrigation Co. v. Dawson County, 106 Neb. 367, 369, 183 N.W. 655, 656 (1921).

enlightening since there is now a procedure to follow that may be applied to any level in the series referred to above.

In deciding whether immunity exists, one must look to the statute creating or regulating the agency in question. For example, some statutes specifically provide that liability shall be limited to a compulsorily purchased insurance policy, and that the state or agency is completely immune.[46] In such a case, the *Stadler* decision has no applicability. However, if procedural immunity is waived by statute but the legislature has not removed the substantive immunity, then one should apply the governmental-proprietary test to determine whether the issue of liability may be decided. This is what *Stadler* seems to say, but the court apparently did not expect it to be a completely effective, workable system in light of Justice McCown's statement of invitation to legislative action.[47] Even so, until such time that the Nebraska State Legislature takes an affirmative action in this area, there is a procedure and test applicable, during this interim, to all state agencies and subdivisions free from procedural immunity.

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[46] NEB. REV. STAT. § 23-175 (Reissue 1962) provides for liability insurance covering highway accidents with county employees. Any claim is limited to the insurance; the county retaining its immunity. Also NEB. REV. STAT. § 79-489 (Reissue 1966) provides a method of compensating injuries in connection with the negligent operation of a school bus. Here claims are also restricted to liability insurance; such operation by the school district being a "governmental function only." L.B. 503, 77th Neb. Leg. Sess. (1967), requires the purchase of liability insurance to cover negligent state employees involved in a vehicular accident. Claims here are limited to the employee. "Nothing in this section shall be considered in any manner to waive the immunity of the State." This provision covers all state agencies with the exception of the University of Nebraska and the Nebraska National Guard.

[47] 182 Neb. at 22, 151 N.W.2d at 924. Same as note 3 *supra.*